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ABSTRACT

Tenured faculty can be dismissed for reasons of financial exigency. If the employment contract provides a specific definition of fiscal exigency and the processes to be used in effecting retrenchment, then those terms govern in lieu of constitutional due process. In the absence of such guidance, courts are willing to allow dismissal for reasons of financial exigency within certain limits. The institution as a whole need not be in an exigent condition to justify dismissal of some faculty, nor must the exigency extend to the endowment or real property of the institution. The institution has the burdens of proving not only financial exigency, but also that dismissal was motivated by the exigent condition. The institution must also show that its selection process was not arbitrary, capricious, or discriminatory. Tenured faculty who are to be dismissed for reasons of financial exigency must be notified and have an opportunity for a hearing before dismissal. Beyond these requirements, faculty have no constitutional right to participate in the retrenchment process. Dismissed faculty, if they are qualified, have the right to available positions in the institution, but in the absence of contract language they have no right to positions held by others and no right to retraining for available positions if they are not qualified at the time of dismissal. Thirty-six court cases are described and discussed in this monograph, and recommendations are made for adoption of legally acceptable policies and procedures for teacher dismissal at educational institutions. (JD)

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DEFICITS, DECLINES, AND DISMISSALS:

FACULTY TENURE AND FISCAL EXIGENCY

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FOREWORD

What happens when the money runs out and programs are cut or institutions close their doors? That question is attracting more and more attention, especially in schools, colleges, and departments of education (SCDEs) where fewer and fewer students are seeking to prepare for careers.

In this monograph, the authors devote most of their discussion to the question of tenured faculty and what the courts have ruled in cases of fiscal exigency. In some cases, the institutions have won; in others, the individuals have been the victors. The verdict depends on a number of factors, as explained in this monograph. Because students and donors also are affected when programs are eliminated, the authors briefly discuss the legal cases relevant to these groups.

The Clearinghouse acknowledges with appreciation the contributions of the three authors--Stinson Stroup, assistant professor of education, Perry A. Zirkel, dean of education, and Nan Van Gieson, former assistant provost, Lehigh University, Bethlehem, Pennsylvania. Mr. Stroup, former assistant attorney general in Pennsylvania, and Dr. Zirkel both hold law degrees and Dr. Van Gieson is on leave to pursue a law degree.

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SHARON GIVENS
Editor, ERIC Clearinghouse
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DEFICITS, DECLINES, AND DISMISSALS:

FACULTY TENURE AND FISCAL EXIGENCY

Enrollment in American colleges and universities is entering an era of decline, according to the National Center for Education Statistics. Cited by Graybeal (1981), N.C.E.S. projected a decline of 200,000 fall semester enrollees between 1978 and 1988. It attributes the decline to a three-million reduction in the pool of 18- to 24-year-olds who traditionally attend college. During the same period the number of new high school graduates is projected to decline by 433,000 to 2.7 million (Graybeal 1981). These are national projections and are not representative of every region or institution (Crossland 1980). Each may change and some more than others, depending on demographic decline and other variables, such as the percentage of the pool attending college, retention rates, and programs for adults.

However it happens, fewer students probably will decrease the demand for faculty. Graybeal reported that the estimated demand for new full-time faculty will fall from 25,000 in 1978 to 21,000 in 1988 and that the number of full-time faculty employed will decrease by 29,000. Judging from classified advertising, engineering and computer science departments will expand, while education departments that lead only toward K-12 certification will contract.

Financial factors also depress the demand for faculty. In part because of the demographic changes, higher education is finding it more and more difficult to compete with other claims on public and private funds. At

a time when costs are inflating, these forces are causing institutions to pursue new money-saving measures, including the termination of faculty positions.

At many institutions faculty have already been dismissed for enrollment and financial reasons, as the national downward spiral in clientele and upward spiral in costs have intersected at particular programs in individual institutions. As the case law discussed in this monograph indicates, programs affected include education, engineering, foreign language, history, pharmacy, and others. The affected institutions range from small independent private colleges to entire state university systems.

Teacher education programs are not immune to these trends. Quite the contrary; they may be particularly susceptible at this point. A survey of the 781 member institutions of the American Association of Colleges for Teacher Education (A.A.C.T.E.) reported an average decrease in enrollment of 12.19 percent for the five academic years ending in 1979-80 (Zirkel and Cyr 1980).

Because funding is tied to enrollment, available resources for teacher education are declining. A number of institutions have closed their education programs, including Duke University, Trinity College, and the University of Bridgeport (Ricklefs 1981). The teacher education programs at Oberlin and Mount Holyoke also were discontinued recently, and Wesleyan's (Connecticut) was severely cut (Travers 1980). The University of California at Berkeley is considering "dismembering" its school of education, and transferring most of its functions to other academic departments (McCurdy 1981).

Irving Spitzberg, Jr., general secretary of the American Association of University Professors, recently stated, "All of the problems we are seeing right now are the overture. The sad symphony itself will be when the Reagan cuts come" (Magarrell 1981). With 80 to 85 percent of the faculty at major teacher education institutions on continuous contract (Watkins 1980), that sad symphony will include the dismissal of tenured professors and education will be affected: A.A.C.T.E. predicts significant numbers of lay-offs (Rosenau 1981). Despite widespread, projected enrollment decline, many faculty and administrators are

suffering from a "not me" or "last survivor" mentality (Magarrell 1980; "Last Survivor" 1981).

In 1970, it was unclear whether tenured college and university faculty could be dismissed on the basis of financial--or fiscal--exigency, that is, insufficient funds or declining enrollments. By the decade's end, case law made it clear that tenured faculty could be dismissed for such reasons. This monograph traces the developing contours of the law that governs the dismissal of tenured faculty for reasons of fiscal exigency. It also discusses incidentally the legal status of nontenured faculty.

Nature of Tenure

Tenure is a qualified right to continued employment. By tradition and by agreement it includes both a substantive and a procedural component: Tenured faculty may not have their employment terminated except for cause and only after notice and the opportunity for a hearing.

Tenure is a right created by a contract of employment between a faculty member and an employing institution. The contract may spell out the specific grounds that justify its termination and the procedures that must be followed in establishing those grounds. Frequently, an employment contract incorporates by reference institutional rules and regulations that identify the causes and procedures for termination. Where there is collective bargaining, specific terms of employment--including terms of tenure--are found often in the collective bargaining agreement.

For faculty at public colleges and universities, tenure also may be defined by statute, and all contract rights, including tenure, must be read in light of statutory and constitutional provisions.

When an employee challenges his or her dismissal and asks the court to overturn it, the court turns first to the contractual provisions, institutional rules and regulations, and state statutes and regulations governing tenure. These are interpreted to ascertain the nature of the employee's right to employment.

A challenge usually is filed as a breach of contract on grounds including the following: (a) the contract did not authorize dismissal for the reason given, (b) the institution's evidence failed to prove the reason cited, (c) the institution erred in its choice of individuals to be dismissed, and (d) the institution failed to follow required procedures for dismissal. This monograph analyzes each of these issues on the basis of case law pertaining to dismissal for reasons of financial exigency.

Fiscal Exigency as Cause for Dismissal

Academic contracts, which may vary from one institution to the next, generally contain a section on for-cause dismissal, but may not contain language specifying fiscal exigency as grounds for dismissal.

Some individual contracts, which are otherwise silent on fiscal exigency as grounds for dismissal, include by reference the institution's rules and regulations pertaining to exigent conditions. Litigated cases have been decided on a variety of incorporated language that identifies financial exigency as a cause for dismissal. For instance, in the Bloomfield College case, the faculty handbook stated, "...a teacher will have tenure and his services may be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigency of the institution" (Bloomfield at 616).

In another case, the Kendall College policy manual stated:

> Nothing in this section on tenure shall in any way restrict or limit the power of the Board [of Trustees] to to make reductions in the number of faculty members because of insufficient funds, decrease in enrollment or discontinuance of particular courses of instruction.... (Rymer at 1091)

When the contract of employment is a collective bargaining agreement, it typically includes specific language on the right to continued employment. The collective bargaining agreement between the State University of New York and its faculty provided for

> retrenchment...as a result of financial exigency, reallocation of resources, reorganization of degree or curriculum offerings or requirements, reorganization of academic or administrative structures, programs or functions or curtailment of one or more programs or functions, University-wide or at such level of organization of the University as a campus, department, unit, program or other level of organization of the University as the chancellor or his designee deems appropriate. (DiLorenzo at 359)

In cases where contract language includes termination of tenured faculty for reasons of "financial exigency," the court's role is to interpret and apply that language to the facts of the case. The issue is often reduced to a question of proof: Had the parties agreed in the contract on these conditions of dismissal? Did the conditions exist that would justify dismissal? The questions of proof and the burden of proof are discussed in more detail later.

Where an employment contract is silent about dismissal for financial exigency, the courts have been willing to read a financial exigency clause into the contract. Several legal theories can be used to infer such contract terms.

National Academic Understanding

The dominant legal theory calls on the national academic community's understanding of tenure. The courts' reasoning is analogous to that of contract interpretation in the commercial sector. Where the parties have left important terms undefined or where inarticulated contract

provisions become critical, the courts--in the absence of a clear intention of the parties to deviate from standard practices--will examine the custom and usage of the trade. Applying this reasoning, the courts have read a financial exigency clause for dismissal into academic contracts on the basis of the 1940 guidelines jointly adopted by the American Association of University Professors (A.A.U.P.) and the Association of American Colleges (A.A.C.). The 1940 statement provides that the employment of a tenured faculty member may be terminated upon retirement, upon a showing of "cause," or upon an institution's demonstrably bona fide fiscal exigency (McNider 1980).

Krotkoff illustrates a court's willingness to read a financial exigency clause into tenure contracts through the national standard rationale. In that case a tenured professor sued a college for damages resulting from her dismissal. The jury awarded $180,000 to the plaintiff. However, the federal district court entered judgment for the college, notwithstanding the jury's verdict. The district court's order was affirmed on appeal.

Krotkoff was one of four tenured professors dismissed by Goucher College in an effort to curb a trend of increasing deficits. At the same time that the college dismissed these faculty members, it took other actions to increase its revenue and cut its expenditures. Krotkoff had been granted indeterminate tenure by letter. The college bylaws defined tenure and identified the grounds for dismissal of tenured faculty. The bylaws did not include "financial exigency" or similar language among those grounds. A faculty grievance committee, to which Krotkoff first appealed, applied criteria that would be used in a for-cause dismissal, and recommended her retention. The college refused to retain her.

In court, Krotkoff argued that dismissal for grounds other than those in the college bylaws was a breach of contract. The court ruled otherwise. On the basis of expert testimony, the court held that the national academic community understood tenure to include the concept of financial exigency as a basis for terminating the employment of a tenured professor. The court referred specifically to the A.A.U.P.-A.A.C. 1940 "Statement of Principles on Academic Freedom and Tenure" as the "most

widely accepted academic definition of tenure" (Krotkoff at 679). That statement includes a financial exigency provision as grounds for termination.

No evidence in the record indicated that Goucher had intended to give a different meaning to tenure or greater protection to its faculty. Therefore, the court applied the national standard and read into Goucher's bylaws financial exigency as a basis for dismissal. The appellate court found that the college had demonstrated a pressing financial need and sustained Krotkoff's dismissal.

Inherent or Implied Power

A second theory the courts use to infer a financial exigency clause into a contract applies primarily to public institutions. As exemplified in Graney, this theory draws on state constitutional and statutory provisions that grant governing boards an "inherent authority" to dismiss tenured faculty for reasons of financial exigency. The inherent authority flows from general language granting the board all powers necessary to perform the duties prescribed by law. One duty is to comply with the legislature's budgetary restrictions. In performing this duty it may be necessary to reduce expenditures, and to do that it may be necessary to dismiss tenured faculty.

Impossibility Doctrine

A third theory that has been argued is based on the doctrines of impossibility and commercial frustration. Borrowed from general contract law, these doctrines recognize commercial frustration in limited cases as grounds for abrogating otherwise binding contractual duties. In the context of higher education, the argument would be that reduced legislative appropriations, the loss of other funding sources, or the loss of students simply makes it impossible or extraordinarily difficult for an institution to meet its otherwise binding obligations. In

commercial settings, the doctrine of impossibility sets a high and difficult standard for the asserting party to meet. Its application to the academic setting would be more like the A.A.U.P.'s 1976 definition of financial exigency, discussed below, than the standards adopted by courts using the national academic community understanding or the doctrine of inherent power.

Regardless of the theory used or argued, no court decision has been found which holds that tenure creates a right to continued employment where there are bona fide fiscal reasons to abrogate the contract.

Bona Fide Exigency

Once it has been established that tenured faculty can be dismissed for reasons of financial exigency, the issue becomes a matter of proof. It is clear that the institution has the initial burden of proof. It is less clear what constitutes "financial exigency" and, therefore, what proof is necessary.

Burden of Proof

The assignment of the burden of proof to the institution flows from another general rule of contract construction. A party seeking to avoid a contractual obligation because of a condition stipulated or inferred in a contract has the burden of establishing the existence of the condition. In the academic context, an institution's contractual obligation to tenured faculty is continued employment absent cause for dismissal. The institution must prove cause, including financial exigency. Frequently, the burden of proof is also assigned to the institution by the terms of the contract of employment (see, e.g., Bloomfield).

Nature of Exigency

It is difficult to define what proof of financial exigency is necessary--that is, to identify what minimum level of financial hardship or decline in enrollment will justify dismissing tenured faculty. Part of the problem in assessing minimum financial exigency is that there are no cases where institutions have lost on this issue; the courts have drawn no bottom line yet. Institutions that have dismissed tenured faculty generally have well-known financial problems. Indeed, in many of the reported cases the dismissed faculty plaintiff has stipulated that the college has a financial exigency, and instead the plaintiff has contested whether the decisions were made in good faith.

An additional problem in defining a minimum standard of financial exigency is that each institution is different. It is difficult to generalize from one institution to another about revenues, enrollments, endowments, programs, and organizational structures. Regardless, it is clear that courts are reluctant to second-guess administrators and governing boards on these issues.

Following the doctrine of academic abstention, courts will defer to the judgment of the institution's officials on the scope of the problem upon the presentation of some tangible evidence of financial and/or enrollment problems. Courts generally will not look into optional resource allocations that could alleviate the need to dismiss tenured faculty. Nor do they typically look into alternate organizational patterns or program decisions that also could alleviate the need to dismiss tenured faculty.

Case law illustrates the varying types of financial exigency that have been held as cause for dismissal. In Krotkoff, Goucher College experienced both large annual deficits aggregating more than $1.5 million over an extended period and a steady decline in enrollment. In Bignall, the evidence indicated "that not only had projected increases in enrollment not materialized, but enrollment had fallen so that the college, which had hired new faculty in 1973, was over-staffed" (at 249). In

Levitt, the financial crisis was the direct result of a cut in state legislative appropriations. The same was true in Klein where, after the City University of New York was forced to close for lack of funds, emergency legislation allowed the system to reopen but with a 13 percent decrease in funds from the previous year and $108 million less than requested by CUNY and approved by the Board of Higher Education.

Several observations about the proof of financial exigency can be made. Private institutions demonstrating a financial need to curtail staff typically have introduced evidence of a pattern and history of operating fund deficits. They have not relied on a single year in which expenditures exceeded revenues to justify exigency, although proof of a pattern of deficits may not be necessary. The trial court in Lumpert simply equated a current operating deficit with exigency.

Public institutions, on the other hand, are more likely to point to an actual or projected single-year deficit to justify financial exigency, and the courts have been willing to accept such evidence as proof of exigency. The underlying reason may be that public institutions are more dependent on a single revenue source--legislative appropriations--and are more restricted in the ability to carry forward an operating deficit.

Where declining enrollment is the basis for the financial exigency cause for dismissal, the decline in both private and public institutions generally has been documented over a number of years (see, e.g., Sich). Where programs have been altered or where organizational structures have been changed and tenured faculty subsequently dismissed, the institution must demonstrate underlying financial problems or enrollment declines to explain the change if it wants to bring the dismissal under the financial exigency rubric (see, e.g., Browzin).

Other issues that bear on the matter of proof include remedial action taken and other available assets. In most financial exigency dismissal cases, the institution introduced evidence of other remedial action that it took, that is, efforts to save money other than by dismissing tenured faculty. This evidence tends to substantiate the severity of a financial problem and the seriousness with

which the institution's officials view the problem. It also tends to show that alternate means of addressing the financial problem have been considered and pursued in a balanced way. While such evidence supports the claim of exigency, it probably is not required. There is no requirement that an institution prove it has exhausted other cost-reducing possibilities or tapped all available resources before dismissing tenured faculty for reasons of financial exigency.

In Bloomfield, the plaintiff faculty argued that there was no financial exigency because the college had substantial assets in real property, which had not been tapped to meet the operating needs of the institution. The trial court considered these assets and ruled that the college failed to prove financial exigency. However, on appeal, the trial court's consideration of the property was found to be improper. Although the trial court's judgment was affirmed on other grounds, the appellate court held that the decision to sell land to secure short-term financial stability or to retain it as part of a long-term plan is a policy decision for the institution. The institution's choice of alternative uses of capital assets "is beyond the scope of judicial oversight in the context of this litigation" (Bloomfield at 617).

The same judicial deference applies to the use of endowments (see, e.g., Scheuer). If financial exigency is established, courts will not consider optional resource allocations that could alleviate the need to dismiss tenured faculty. They are reluctant to substitute their judgment for that of the governing board on business and education issues (see, e.g., Klein).

Scope of Exigency

Institution officials have been given broad authority to determine the campuses, programs, and departments that will be cut when an exigent condition exists. Where the financial problems are institutionwide, the remedy can be institutionwide or officials may choose one or more units to bear the brunt of the cuts. For example, in Levitt, Bignall, Klein, and Krotkoff, the institutions responded

to their financial problems by examining their entire institutions for cuts. In Levitt and Bignall, administratively developed criteria were applied throughout the two colleges. In Klein, administrators considered the expendability of individual programs, which would free resources for the support of other programs. In Krotkoff, the college chose to cut the modern foreign language program in response to an institutional deficit.

Where the exigency is more limited, the remedy may be more limited. In Browzin, the School of Engineering and Architecture at Catholic University of America faced a severe budget reduction. The court did not discuss the financial well-being of the university as a whole. There was no evidence that program cuts were considered outside of the School of Engineering and Architecture, and the dismissal of a tenured faculty member from the school was upheld.

Scheuer involved a similar issue but different contract language. Scheuer was a tenured member of the School of Pharmacy at Creighton University. The school was running deficits while the university as a whole was financially sound. After pursuing other cost-reducing measures, the school dismissed Scheuer and other faculty members pursuant to a financial exigency clause in the faculty handbook. The clause provided in part "financial exigency...may be considered to include a bona fide discontinuance of a program or department or the reduction in size thereof..." (Scheuer at 597). The court concluded that the university did not err in determining exigency within the School of Pharmacy and that consideration of the institution as a whole was not required. The dismissal was affirmed.

The Creighton University faculty handbook included the university's endorsement of the 1940 A.A.U.P. "Statement of Principles on Academic Freedom and Tenure" and the 1958 A.A.U.P. standards in faculty dismissal proceedings. The handbook was silent on the 1976 A.A.U.P.-developed regulations on academic freedom and tenure, which define financial exigency as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic measures." Scheuer argued that the 1976

language should have governed the 1977 decision. Citing Browzin, the court rejected the argument.

In Scheuer, the specific handbook language easily can be read to override the A.A.U.P.'s 1976 regulation. Where handbook or contract language is silent on the extent and meaning of financial exigency, a court could turn to the 1976 A.A.U.P. regulation on a national standard rationale similar to that used in Krotkoff (see "Fiscal Exigency as Cause for Dismissal" supra). However, such a result is doubtful. The A.A.U.P.'s 1976 regulation does not have the same national status as its 1940 statement of principles. In addition, because of public policy, the courts may hesitate to adopt the regulation in the absence of clear contract language incorporating it.

The 1976 A.A.U.P. definition of financial exigency as a "crisis which threatens the institution as a whole" has not gained the general acceptance within the national academic community that earlier A.A.U.P. statements have enjoyed. The 1940 "Statement of Principles on Academic Freedom and Tenure," relied on in Krotkoff, was developed jointly by the Association of American Colleges and the A.A.U.P. and was adopted by a number of other professional organizations. The 1976 statement has not received such general endorsement.

The court in Scheuer enunciated the policy argument against the 1976 A.A.U.P. definition of financial exigency when it said:

> ...to accept plaintiff's definition would require Creighton to continue programs running large deficits so long as the institution as a whole had financial resources available to it. The inevitable result of this type operation would be to spread the financial exigency in one school or department to the entire university. This could likely result in the closing of the entire institution. (at 601)

Thus, as Scheuer, Browzin, and Cross suggest, individual schools, departments, or programs can be curtailed or eliminated if the financial exigency is limited to the school, department, or program.

The program chosen for elimination need not be the primary source of the exigency. In Lumpert, the university terminated its entire foreign language department after entering into a joint agreement with neighboring colleges to provide language courses for its students. The university then dismissed members of its foreign language faculty. The institution proved financial exigency by citing a half-million dollar deficit over a four-year period that had depleted its unrestricted endowment. The foreign language department appears to have been "self-sufficient" while the seminary was the primary source of the deficit. Dismissal of the foreign language faculty for reasons of financial exigency nonetheless was upheld.

As with the determination of resource allocations, courts are reluctant to second-guess administrators and governing boards on program decisions. After an institution presents evidence of a fair process used to make the decision, courts will not look into optional decisions that could alleviate the need to dismiss tenured faculty. However, the existence of financial exigency does not give the institution license for wholesale program changes and subsequent dismissals. If the scope of the cuts is much greater than the exigency would justify, then the courts are likely to require additional evidence from the institution to show that financial exigency is the bona fide reason for dismissals.

Bona Fide Decisions

Institutions dismissing tenured faculty for reasons of financial exigency must prove not only that exigent conditions exist, but also that the exigency is the bona fide reason for the decision to terminate employment. Frequently, this requirement is stated in the employment contract, but where the contract is silent, the courts will impose the requirement to ensure that the stated cause--some form of financial exigency--is the reason for the dismissal and not some hidden, unacceptable reason. This requirement protects the central concern of the

tenure system, which was characterized by one court as the prevention of

> ...arbitrary or retaliatory dismissal based on an administrator's or trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting...[and] the chilling effect which the threat of discretionary dismissal casts over academic pursuits. (Browzin at 846)

An institution has the additional burden of proving that its decision to eliminate positions was motivated in good faith by the need to adjust to new enrollment patterns or financial needs. First, the institution must show that it used a reasonable process to determine what programs, departments, or positions to cut. Second, the institution must show that the scope of the cuts was reasonable in light of the extent of the financial exigency. Third, the institution must show that the choice of individuals to be dismissed was not arbitrary or capricious. Finally, the institution must show that its decision was not based on improper motives.

Choice of Programs

Reported cases make frequent reference to the institutional processes used in making program decisions that result in the dismissal of tenured faculty. Although institutions are not required to use any particular process, whatever they choose must be reasonable and fair. Often, the courts stress involving faculty and faculty-administrator committees in the program-cutting process. For instance, when the Catholic University School of Engineering and Architecture faced reduced funding, the administration in conjunction with the faculty considered retrenchment and reorganization (Browzin).

Likewise, in Klein, the New York City Board of Higher Education had adopted "Guidelines and Procedures for Retrenchment," which were designed to meet the judicial

good faith standard. The guidelines directed the president of each CUNY branch to "determine after consultation with appropriate faculty and student representatives what programs or activities are to be cut back or terminated"; they specified that the resulting retrenchment plans "set forth the reasons why reduction or termination of academic or nonacademic service is required with respect to each department or function"; and they required that "the reasons must be related to financial needs and be directed at the needs of the college and department or function" (Klein at 1115).

Although faculty participation is common, it is not required. In Bignall where the dismissal was upheld, the college president testified that he alone formulated guidelines to be applied to the 50-person faculty. In Levitt, the president and two deans prepared a list of 16 criteria and applied these to select faculty to be dismissed. The dismissals were upheld.

In Cross and Johnson, the issue of whether affected faculty were entitled to participate in the decision to terminate a program was specifically considered and answered in the negative. In Cross, an instructor appealed his dismissal from a Nebraska community college to the state's supreme court. Cross, the instructor, had been offered a hearing on the decision by the employing board not to renew his contract, but not until after the board had decided to terminate the program in which he was the sole instructor. Cross argued before the board and in court that he had been denied due process because he had not been afforded a hearing on the decision to terminate the program. The board's decision, he contended, directly affected his property interest in continued employment, and the subsequent hearing on his dismissal, he argued, was a sham. The court rejected this argument stating:

> ...the Legislature has placed the duty and responsibility of administering the affairs of the college with the Board of Governors, not with the faculty. This responsibility, by statute, includes establishing curriculum and employing members of the faculty....Clearly, Mr. Cross has neither a constitutional nor a

statutory right to take part in the process of making this decision. (Cross at 927)

In Johnson, a federal district court more fully considered the question of faculty participation at each stage of the termination process. In that case, the plaintiffs--tenured faculty from six campuses of the University of Wisconsin system--sought a preliminary injunction to prevent termination of their jobs. They argued that the university had denied them the due process protections required by the Fourteenth Amendment to the U.S. Constitution. Their motion for a preliminary injunction was denied.

The court found that the plaintiffs had a property interest within the meaning of the Fourteenth Amendment, which could not be taken away without some mininmal procedural protections. However, the court identified the following levels of decision-making that affected the protected property interest: (a) the gubernatorial and legislative decision to cut appropriations; (b) the Regents' and central administration's decisions in allocating campus by campus both the reduction in base budget and the reduction created by decreased enrollments; (c) the decisions by the campus chancellors as to apportioning the reduced funds; and (d) the decisions of which faculty to lay off as a result. The court suggested that, although it might have been desirable to involve the faculty in each step of the decision-making process, it was not required constitutionally.

To rule that the Fourteenth Amendment requires faculty involvement in all decisions affecting or potentially affecting employee property interests would raise serious questions about other situations where statutorily created property interests are affected. The court raised this specter without discussion, and concluded similar to the Cross court that "the identity of the decision-maker and the choice of a basis for selection lie within the discretion of state government" (Johnson at 238).

Although the Constitution does not require faculty participation in these kinds of program decisions, individual institutions may have rules or collective

bargaining agreements requiring such participation. Failure to follow the rules in these agreements exposes an institution to a court reversal of its decisions (see, e.g., Paulsen).

DiLorenzo addressed the interplay of institutional rules and collective bargaining agreements on the issue of faculty participation in program decisions. At the State University of New York, the collective bargaining agreement contained detailed procedures on retrenchment. When the president gave notice to faculty members pursuant to the provisions of that agreement, the faculty claimed a constitutional right to raise policy issues similar to the right claimed and rejected in Cross and Johnson. The SUNY faculty cited a policy adopted by the Board of Trustees, which stated:

> The services of any member of the academic staff may be terminated in the event of financial or program retrenchment. If the chancellor anticipates that such retrenchment may be necessary, he shall seek the advice of the faculty senate concerning the policy to be followed in the reduction of staff. (DiLorenzo at 360)

However, the collective bargaining regulations stated that "in the event the provisions of the agreement are different from the position of [the board's policy], the provisions of the agreement shall be controlling."

The court enforced the provisions of the collective bargaining agreement, and speculated that the board's policy "could very well overlap and conflict with the detailed manner of handling retrenchment spelled out in the collective bargaining agreement" (DiLorenzo at 361). Thus, the policy was not governing, and the dismissals solely on the basis of the collective bargaining procedures were upheld.

In sum, courts are willing to defer to institution officials on the choice of programs to eliminate or curtail, as long as the fiscal basis was arrived at in good faith, the choice was not arbitrary or capricious, and the process was fair.

Choice of Remedy

Requirements of bona fide proof are imposed on institutions to prevent the use of financial exigency as a pretext for dismissal on the basis of other inarticulated and unacceptable reasons. For example, a limited exigency does not justify wholesale dismissals by an institution. Where the institution's action affects the tenure of more faculty than the size and scope of the exigency justify, courts are likely to require additional evidence from the institution to show that its action was reasonably related to the exigency.

In Bloomfield, the courts were called upon to interpret the contract of employment between terminated faculty and a private institution. The trial court ruled in favor of the plaintiff faculty and ordered their reinstatement. On appeal, the decision was affirmed because the college "failed to establish 'by a preponderance of the evidence that [its] purported action was in good faith related to a condition of financial exigency within the institution.'" (Bloomfield at 618).

The appellate court held that the college had met the burden of demonstrating financial exigency, but that the trial record held insufficient evidence to demonstrate that "the financial exigency was the bona fide cause for the decision to terminate the services of 13 members of the faculty and to eliminate the tenure of the remaining members of the faculty" (Bloomfield at 617). The exigent condition as demonstrated did not warrant the broad action taken by the Board of Trustees.

The college presented no evidence of financial benefit from its decision to abrogate all tenure rights, which was in the words of the trial court, "a gratuitous challenge to the principle of academic tenure" (Bloomfield at 856). This finding and documentary evidence that the president of the college was hostile to the concept of tenure tainted the board's other actions (discussed under "Program Criteria" infra) and led the court to conclude that Bloomfield College failed to prove that its actions were motivated in good faith by the financial exigency. It is unclear from the court records if any of Bloomfield College's actions alone would have resulted in the finding

of failure to prove bona fide cause or whether their cumulative effect produced that conclusion.

Bellak affirmed a college's action terminating all faculty contracts for reasons of financial exigency. Instead of a traditional tenure policy, the college in Bellak employed faculty on one- and three-year contracts and staggered the expiration dates. When the college was faced with a large deficit and it became clear that some contracts would not be renewed, the faculty passed a resolution asking the board to declare a state of financial exigency and terminate all contracts at the end of the academic year. The faculty wanted to avoid the automatic unemployment of those whose contracts were due to expire, and terminating all contracts would allow the board to decide who would be dismissed with the least harm to the college. The board followed the faculty's recommendation. Two faculty members, whose contracts were terminated mid-term, sued and recovered damages at the trial. However, on appeal the trial court's decision was reversed and the board's action upheld. The appellate court found that the Board of Trustees had retained the power to remove a faculty member during the term of the contract for reasons of financial exigency. The court did not discuss the good faith standard applied in Bloomfield.

Choice of Individuals

In general, the choice of individuals to be dismissed follows from the decisions about which programs or departments to cut and the extent of those cuts. After these decisions are made, the identification of individuals subject to dismissal is often clear. In such cases, the criteria used for program cuts are the same for personnel cuts. Additional criteria are not needed.

Program Criteria. In Browzin, officials of Catholic University's School of Engineering and Architecture decided to pursue a policy of selective excellence and to maintain those programs where it had academic strength. Experiencing financial exigency, the school chose to eliminate its weaker programs, including those that

Professor Browzin taught. Having made those decisions, the choice of Browzin for dismissal followed without further criteria.

In Cross, the governing board decided to eliminate the program in which Cross was the sole instructor. Again, having made the program decision, the board's logical choice was to dismiss the instructor. Similarly, in Rymer, the decision to eliminate the courses taught by the dismissed faculty member gave rise to the dismissal.

Courts tend to uphold reasonable criteria developed by an institution. In Brenna, the college reduced its full-time faculty from 340 to 308, with the number of cuts allocated administratively in each department. The heads of the affected departments were charged to recommend the faculty member "his department would best get along without." Professor Brenna was chosen for dismissal even though he had tenure and a nontenured professor, who gave the department greater versatility in the courses that were continued, was retained. The court upheld the dismissal, concluding that the criterion was reasonable and its application fair.

Similarly in Krotkoff, one of the two tenured German teachers was dismissed as a result of the decision to eliminate advanced German literature courses. The department head recommended keeping the instructor who had more experience in teaching the introductory courses and who also was qualified to teach French. The court affirmed the dismissal of Krotkoff, who had taught the advanced courses.

Bloomfield College's failure to prove that its financial exigency was the bona fide cause of its dismissing faculty may have been due, in part, to its failure to formally establish program criteria before the dismissals. One of the college's responses to its exigent condition was to restructure its curriculum, but the new curriculum was not adopted until after the dismissal actions. Hence, the program decisions could appear as an attempt after the fact to rationalize the dismissals.

Both Brady and Levitt provide insight into the requirement of bona fide conduct by administrators in the choice of individuals to be dismissed. These cases were precipitated by reduced legislative appropriations to the

Nebraska state colleges. Professors Brady and Levitt taught at different colleges in the system and each college used different criteria to select individuals to be dismissed. Levitt's dismissal was upheld on the grounds that "objective criteria" were used in choosing him for dismissal, whereas Brady's dismissal was reversed because no clear, objective rationale supported the decision to dismiss him.

Professor Brady was a tenured professor in the history department where three positions were to be eliminated. When Brady was dismissed, a nontenured member of the department was retained and the former president of the college was added. Others, including a nontenured member of the department, were assigned to teach courses previously taught by Brady. As the court characterized it, "Brady's position was not eliminated but Brady was" (Brady at 619). Because Brady was given neither appropriate reasons nor a hearing, the court found that he had been denied due process; he was reinstated with back pay.

Each of these cases has shown that the institution must use objective criteria in deciding whom to dismiss and that the criteria must be related to a legitimate academic purpose or institutional objective. However, the courts have cited no specific criterion for dismissal or retention.

In Brady and Bloomfield, the court's opinions suggest that failure to offer other available positions to qualified dismissed faculty brings into question financial exigency as the motivation for the discharge and whether legitimate program criteria support the dismissal. Bloomfield College appointed 12 new, full-time faculty members to fill positions the college claimed had been vacated by normal attrition. The 13 dismissed faculty members reinstated by the suit were not given an opportunity to demonstrate their qualifications for the new positions. The trial court found that the college had failed to show that the dismissed faculty were not reasonably qualified for the 12 new positions. This finding supported the court's conclusion that Bloomfield College failed to prove that its financial exigency was the bona fide cause of the dismissals.

Although the courts suggest transferrals in lieu of dismissals, it is unclear who has the burden of proving the availability of suitable positions. Must the institution, which generally has greater access to information on positions and the qualifications necessary to fill them, demonstrate that none are available for a discharged faculty member? This appears to be the inference in Bloomfield (see also University of Alaska). Or, must the dismissed faculty member prove that there is an available position for which he or she is qualified? This appears to be the requirement in Rymer and Bignall. In Browzin, the court specifically discussed the proper placement of the burden of proof of the existence of a suitable available position. The court suggested that under the A.A.U.P.'s 1968 regulations, which governed the case, and under general legal principles this burden should fall on the institution. However, the court was not required to so hold because the plaintiff had not preserved this issue for appeal.

A related issue is the right of a dismissed tenured faculty member to retraining for an available position for which he or she is not qualified. In Krotkoff, the dismissed faculty member claimed a right to an open position in another department, but she would need additional training to be qualified. The court held that, in the absence of explicit contract language otherwise, the college was not required to provide such training or to offer the position to the dismissed faculty member. A footnote in Bignall suggested the same result.

Non-program criteria. Criteria such as seniority and tenure status can be used by an institution in making dismissal decisions for reasons of financial exigency. A contract of employment, an institutional policy, or a collective bargaining agreement can provide that tenure status and seniority must be considered in dismissal decisions (see, e.g., Klein, DiLorenzo). However, in the absence of such language, the courts appear willing to allow, but unwilling to require, tenure and seniority as controlling criteria. Unless the contract provides otherwise, a tenured professor can be dismissed while nontenured faculty are retained (see, e.g., Brenna).

Also, a senior tenured professor can be dismissed and less senior faculty retained to teach courses that the dismissed professor is qualified to teach (see, e.g., Rymer, Bignall).

The courts have not clarified whether race and sex can be used as criteria for dismissal decisions in order to comply with affirmative action goals. The use of seniority as a criterion may wipe out the gains that minorities and women have made in academic employment. On the other hand, criteria that specifically protect these groups may breach state and federal laws that prohibit discrimination on the basis of race and sex. At public institutions, such criteria may also violate the U.S. Constitution. No court decisions directly address this issue in the context of academic dismissals for reasons of financial exigency.

In the private sector, affirmative action employment programs have been upheld. In Weber, the U.S. Supreme Court held that Title VII of the 1964 Civil Rights Act did not prohibit a provision in a collective bargaining agreement between private parties that authorized racial criteria for admission to a training-for-promotion program. This affirmative action, which provided for separate seniority lists for white and black candidates, was designed to overcome gross imbalance in the racial composition of the work force. The court, recognizing a line between permissible and impermissible affirmative action plans, found the plan in Weber permissible in part because it did not unnecessarily infringe on the interests of white employees.

Use of separate seniority lists for dismissal rather than promotion may cross that line. In Watkins, a lower court ruling that ordered an adjustment in a collective bargaining retrenchment procedure on the basis of seniority was overturned on appeal. The lower court had argued that the use of seniority for layoff decisions perpetuated the effects of proven past discrimination. The appeals court said that since none of the plaintiff black employees themselves had been denied employment before the company's adoption of equal employment practices, they could not claim earlier seniority. The appeals court found that the collective bargaining

agreement did not violate Title VII and that Title VII sanctioned the use of seniority for retrenchment.

However, courts have ordered adjustments in seniority. In Oliver, the layoff provisions of the collective bargaining agreement between the Kalamazoo school board and its teachers were challenged. The contract called for furloughs in inverse order of seniority. The plaintiffs, who earlier had obtained both a judgment that the school district was unconstitutionally segregated and remedies that ordered minority hiring, sought reinstatement of black teachers who had been furloughed. The court distinguished the remedies available in Title VII actions from those available in school desegregation suits, and then ordered that any recall of furloughed teachers be made first from all black, tenured teachers. When all black, tenured teachers were recalled, future recalls could be based on seniority so long as at least 20 percent of all recalls in any year were filled by black employees. A court probably will not reach such a conclusion without a prior finding of unconstitutionally discriminatory employment practices and a finding that layoffs on the basis of seniority alone will nullify gains made under remedial hiring practices.

Bakke, a case involving student admissions, suggests that courts will apply strict scrutiny to the use of race by public colleges and universities as a criterion for decisions. Four justices of the U.S. Supreme Court ruled on the basis of Title VI alone, finding that it precluded the use of racial criteria for admission, and did not reach the constitutional issue. Five members of the court decided the constitutional question in Bakke, and all five agreed that racial classifications of any sort are suspect and call for strict judicial scrutiny. Four found the purpose of overcoming substantial, chronic, minority underrepresentation in the medical profession sufficiently important to justify the medical school's remedial use of race as an admissions criterion. Mr. Justice Powell, writing for the divided Court, found the medical school's goal of achieving a diverse student body sufficiently compelling to justify consideration of race in admission decisions under some circumstances, but insufficient to support a quota system that foreclosed consideration of

Bakke. Regarding academic employment cases, the Bakke case implies that if a racial criterion may be used at all in retrenchment decisions, it must be one of several criteria used in concert and it must be justified by instructional or other legitimate academic goals.

Use of Improper Criteria

The requirement that clear, objective criteria be used in making termination decisions is designed to prevent both arbitrary or capricious action by administrators and the use of financial exigency to hide impermissible grounds for dismissal. After an institution has presented evidence of reasonable, objective criteria, the burden of proof shifts to the faculty member to prove that the dismissal was improperly motivated.

In Bignall, the plaintiff failed to meet this burden of proof, but in Cherry and Mabey, the courts specifically discussed the issue of improper motivation for the dismissals as raised by the plaintiff faculty. In both cases, the faculty members were not tenured and their contracts were not renewed for reasons that included financial exigency.

In Cherry, the three plaintiffs claimed that they were dismissed because of their union activities and their statements made against the administration. The court assigned this burden of proof to the plaintiffs, and subsequently held that they were not discharged because of exercising their First Amendment rights. The court concluded that the contracts "were not renewed because of budgetary and other valid reasons," and added, "assuming arguendo that constitutionally protected conduct on their part had been a motivating factor, the defendants would have reached the same decision in any event" (Cherry at 333). The institution's decision not to renew the contracts was upheld (see also Shaw).

In Mabey, the plaintiff, also a nontenured faculty member, was given no reason for the decision not to renew his contract. Subsequently, the college offered two reasons: unprofessional conduct at a meeting of the faculty senate and the overstaffed condition of the

department of philosophy in which Mabey taught. The court of appeals reversed the trial court's summary judgment for Mabey, finding that in the absence of tenure he had no right to continued employment nor to notice and a hearing. However, because Mabey had raised a First Amendment claim for a speech given at a faculty senate meeting, the legality of not renewing his contract depended upon further fact finding. The appeals court remanded the case for the trial court to ascertain if the philosophy department was overstaffed and if his speech was protected.

In D'Andrea, the most recent case involving First Amendment rights, a tenured faculty member won a favorable verdict, attorney's fees, and court costs in action against Troy State University in Alabama. D'Andrea proved that the university's decision to terminate his program was a retaliation for his statements to state officials about the university's finances.

Procedural Protections

One way for faculty and institutions to protect against arbitrary and impermissible decisions, such as a professor's exercise of First Amendment rights, is to require the decision-maker to state the specific reasons for the dismissal and to provide the affected faculty member with an opportunity to respond at a formal hearing.

Tenure is a contract right that creates a certain expectation of continued employment. This expectation is a property interest. When the employer is a public institution, this property interest cannot be taken away without due process as required by the Fourteenth Amendment to the U.S. Constitution. At a minimum, the due process clause requires some kind of notice and some kind of hearing. At private institutions, the right to notice and a hearing often is written into the employment contract (see, e.g., Trimier).

For many public institutions, the nature of the hearing that must be offered is spelled out in a state's administrative procedures act or a specific tenure act.

At both public and private institutions, employment contracts may spell out the procedures to be used in financial exigency dismissals. In Brady, for example, failure to provide the hearing called for in the collective bargaining agreement resulted in the faculty member's reinstatement.

The hearing procedure specified in the contract governs, even though it may not meet a higher constitutional standard. For example, the court in DiLorenzo held that the collective bargaining grievance procedures governed the dismissal of professors for reasons of financial exigency and stated that "whatever other rights they might have had of a procedural or constitutional nature, are deemed waived" (DiLorenzo at 360).

Johnson provides a comprehensive discussion of the application of the Fourteenth Amendment to the financial exigency context. The court in Johnson concluded that the following procedures were minimally required by the Constitution:

> ...furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay off; furnishing each plaintiff with a description of the manner in which the initial decision had been arrived at; making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied; and providing each plaintiff the opportunity to respond. (at 240)

The hearing, the Johnson court found, does not have to be an adversarial, trial-type proceeding; nor does it have to be before a totally objective examiner (the chancellor, his designee, or a panel from the college could hear and ultimately decide a case); nor must formal rules of evidence be followed so long as each dismissed employee is given a fair opportunity to show--

(1) that the true reason for his or her layoff was a constitutionally impermissible reason; or (2) that, given the chain of decisions which preceded the ultimate decision designating him or her by name for layoff, that ultimate decision was nevertheless wholly arbitrary and unreasonable. (Johnson at 240)

Similarly, in Frumkin, Kent State University's refusal to allow the plaintiff faculty member's attorney to cross-examine witnesses, conduct direct examinations, or make objections to testimony was not judged to be a violation of the Fourteenth Amendment. Frumkin was a tenured member of the education department. Because of a cutback in outside funding, he was selected for termination on the following criteria: training, experience, skills, and performance. The appeals court held that he was entitled to a hearing, but that the role of his attorney at the hearing--consulting with and advising him--was sufficient due process.

Frumkin and another recent decision (Compton College) also demonstrated that, depending on institutional or statutory procedures, the ultimate university decision-maker need not adopt the hearing body's recommendations.

Amending the Contract of Employment

Whether an employment contract is individual or a collective bargaining agreement, it can be amended by the consent of both parties; where the contract rests on and incorporates the rules and regulations of an institution, it is less clear what mutual consent is necessary to amend it.

In Rose, the dismissed faculty member argued that a change in the college's policy manual was ineffective because it was adopted unilaterally by the college after he was granted tenure. The trial court ruled as a matter of law that the amended contract governed the dismissal. The appellate court found it unnecessary to determine

which policy governed, and ruled the dismissal proper according to the language of the policy under which Rose was hired as well as the amended language.

In Steinmetz, the dismissal of a teacher was upheld on the basis of a decline in speech class enrollment. The policy under which the teacher was hired did not provide for dismissal because of financial exigency, but that policy was amended after the plaintiff was tenured. The court upheld the board's inherent power to retrench.

A case that does not deal directly with financial exigency is relevant to the issue of contract amendments. In Rehor, amendments to the employing institution's policies changed the plaintiff faculty member's right to continued employment by lowering the mandatory retirement age from 70 to 68. The policy change was prompted by the merger of two institutions that had different retirement ages. The court found the amended policy a valid basis for termination. The court reasoned that since the faculty member had continued employment under the new policy, he had consented to it. The court went on to find the new policy reasonable and uniformly applied. Presumably, unreasonable, unilateral action by an institution or selective application of a policy change might yield a contrary result.

One problem tenured faculty encounter in trying to enforce the individual contract or the policies under which they were initially hired is the general contract concept of consideration. To create a legally binding promise, the courts generally require a party to have given up something of value in exchange for the promise. In academic employment, the policies under which an employee is hired may constitute a promise, but it is often difficult to find employee consideration for the promise of continued employment if faculty can resign at any time. The trial court in Lumpert suggested that, absent consideration beyond the employee's promise to perform, the contract for permanent employment may be construed to be for an indefinite time terminable at the will of either party. Although this may be the general rule in commercial settings, it is not the general understanding in the academic context. The consideration argument was rejected on appeal.

On balance, courts appear willing to enforce amended policies. Often, courts will use an inherent power or reserved power argument to find authority for the governing board to change its policies. That is, the statutes or the charter governing the institution authorize the board to make policies and reasonable changes in those policies from time to time. Courts also may infer the consent of a faculty member to a policy change by citing his or her decision to remain at the institution after the policy change.

Challenges by Students and Donors

The preceding discussion has concentrated on dismissed faculty asserting contract rights to continued employment, but others may have contract rights to assert if a program is discontinued or an institution closed. Specifically, students and donors also may have enforceable contract rights. Their rights would not affect the dismissal of individual faculty members, but may be exercised to recover damages for program terminations or to prevent institutional closings and subsequent dismissals.

There is little case law on this point, but there is some support for the proposition that students displaced by an institution's decision to terminate a program may be able to recover money damages for breach of contract. The nature of the specific contract between the institution and the student will vary from institution to institution by the language of the college catalogue and the specific circumstances of each case. Students generally will argue that an institution has an implied contractual obligation to maintain programs until the students in those programs have had a reasonable opportunity to complete them. The institutions will raise some of the same defenses that they raise in faculty suits--impossibility, commercial frustration, inherent authority, and lack of consideration by the students to form a binding contractual obligation.

An Ohio case suggests that in some circumstances students may be successful in asserting a contract right

to a specific program. In Behrend, a state court allowed students to recover damages that they suffered when Ohio University failed to maintain accreditation for its School of Architecture. The students proved that they had been assured that the university was working toward re-accreditation, that they had relied on that promise, and that the loss of accreditation was occasioned by the university's decision to phase out the School of Architecture. Although the school continued to operate until students enrolled in the program could finish, the loss of accredited status resulted in a demonstrable loss to the students. Accordingly, they were allowed to recover as damages their lost earnings and the excess cost of tuition to complete their program elsewhere. In Peretti, students were similarly successful in asserting a contract right against a public institution that cancelled a program.

Students were plaintiffs in Zehner, a challenge to the decision by the Wilson College Board of Trustees to close the college. Significant to the outcome, contributing alumnae were also plaintiffs in the suit. The court enjoined the closing and ordered the removal of the president and another member of the board.

The suit was heard in Orphan's Court as the issue was the disposition of charitable contributions. The court in this context held that, while the board could close the college, prior court approval was required both for the decision to close and for the disposition of the college's assets. The court, applying a "survival standard," went on to overturn the board's decision to close. The court found that fulfillment of the charter purposes was neither impossible nor impractical. The college, the court said, was not bankrupt nor near bankruptcy, as its assets far exceeded the established or known potential liabilities.

This higher standard of financial exigency is probably limited to cases involving disposition of charitable contributions for a purpose other than that for which the funds were specifically given. Although the court was applying a specific Pennsylvania statute, this standard comes from the trust doctrine of cy pres, which allows trustees to spend trust funds for a purpose similar to that for which the funds were given when the original

purpose becomes impossible. Courts are strict in applying this standard and generally limit the trustee to the specific terms of the gift. It is unlikely that the Wilson College standard will be used in dismissal cases not involving testimentary and charitable giving, but it should put colleges and universities on notice that decisions to terminate programs or institutions may be subject to donor restrictions. The case also may offer individual faculty members in endowed positions some additional protection from dismissals for reasons of financial exigency.

Summary

Fiscal exigency is a regrettable but inevitable problem for an increasing number of colleges and universities and their tenured faculties. In the wake of faculty dismissals, litigation continues to percolate into the courts (Watkins 1981). An understanding of the court cases in which tenured faculty were laid off for reasons of financial exigency can help to mitigate expensive and divisive litigation.

Tenured faculty can be dismissed for reasons of financial exigency. If the employment contract that grants tenure or the institutional regulations that govern tenure provide a specific definition of fiscal exigency and the processes to be used in effecting retrenchment, then those terms govern in lieu of constitutional due process. In the absence of such guidance, courts are willing to allow dismissal for reasons of financial exigency within certain limits.

The institution as a whole need not be in an exigent condition to justify dismissal of some faculty, nor must the exigency extend to the endowment or real property of the institution.

The institution has the burdens of proving not only financial exigency, but also that any dismissal was motivated in good faith by the exigent condition. The institution also must show that its selection process was not arbitrary, capricious, or discriminatory.

Public institutions must offer tenured faculty who are to be dismissed for reasons of financial exigency notice and an opportunity for a hearing before dismissal. The hearing need not be a trial-type proceeding. Beyond these requirements, faculty have no constitutional right to participate in the retrenchment process.

Dismissed faculty, if they are qualified, have the right to available positions in the institution, but in the absence of contract language they have no "bumping" right to positions held by others and no right to retraining for available positions if they are not qualified at the time of dismissal.

Recommendations

Adoption of legally acceptable policies and procedures are in the interest of both the institution and the individual. Yet, hoping the problem will not appear, the majority of colleges and universities have not developed policies for faculty retrenchment ("Last Survivor Mentality" 1981). The need for systematic planning and preparation of such policies seems obvious.

Adoption of institutional procedures serves several functions. First, issues can be isolated so that they are more manageable, the process more rational, and the results more fair. Second, faculty participation, although not a constitutional requirement, is advisable because the general acceptance of the final policy is more likely, and because participation can provide insights into problems that otherwise may be unanticipated. Third, adoption of clearly written policies makes it less likely that arbitrary and invidious factors will influence termination decisions, if and when such decisions must be made. Finally, written policies reduce unnecessary anxiety among institutional administrators and faculty members as termination decisions become more predictable.

Policies should be stated as clearly and specifically as possible. An important function of specific criteria can be to provide an "early warning system" to be used to identify problems for corrective action before contract

terminations become necessary. General rules can be illustrated usefully with hypothetical situations and expected responses.

Issues that can be isolated for early resolution include (1) if and when a financial exigency exists; (2) what programs, departments, and/or positions may be affected by various exigent conditions; (3) which individual contracts may be terminated, and (4) whether and how terminated faculty have rights to other positions within the institution, to retraining, to "bumping," to severance pay, and to recall at a later date.

The indicators to determine if and when a financial exigency exists may include financial and enrollment criteria, and contingencies for program and mission changes in response to fiscal problems. The policies also may identify the necessary scope--throughout the institution or within a specific program or department--for fiscal exigency. The definition of program units linked to exigent criteria can determine the extent of programs, departments, and positions that will be subject to termination. Use of hypothetical situations to illustrate the policy may be especially useful in this area. Procedures to determine which individual contracts will be terminated should be fashioned from any objective criteria, such as seniority, rank, tenure status, merit, and need. Each criterion should be carefully defined. If merit is to be used, the evaluation process should be clearly distinguished from the process used for other purposes, such as promotion and for-cause dismissal.

The procedures should identify the decision-makers and set the boundaries in which those decisions will be made. At public institutions the procedures must include notice and the opportunity for dismissed faculty to challenge their termination at a hearing. At private institutions the inclusion of similar provisions, while not constitutionally required, will make the process fair in appearance and actuality. Such provisions will help to ensure that objective criteria have been applied fairly. The hearing procedures should be spelled out and distinguished from other hearing procedures available to faculty, such as hearings for personal cause dismissals.

Institution officials may object that written rules

limit their discretion to respond to exigent conditions, but it is precisely because their discretion is limited--channeled, confined, structured, and checked--that the process will be and will appear to be more fair. Individual termination decisions will not have to be made and justified on an ad hoc basis, and if challenged in court, proof of bona fide action will be easier.

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